have dealt with flood waters according to the rules applicable to natural streams, and others have treated them as surface water. But even in those jurisdictions, in view of the great confusion in past decisions and the inevitable presence of distinguishing facts, the doctrine of *stare decisis* should prove no obstacle to a new classification.[12] The resulting conservation of natural resources should justify courts in confining the other classes to the waters which are clearly within them. Strangely enough one of the states where irrigation is of least importance has felt most strongly the desirability of treating flood water differently from surface water or water in a watercourse, — as evidenced by a decision that a non-riparian owner has not only a right to flood water, but also a right to have it sweep across a riparian owner's land. *Thompson* v. *New Haven Water Works*, 86 Atl. 585. Praiseworthy as is the feeling that inspired such a decision, the actual holding is objectionable. It subjects the riparian owner's land to a highly onerous easement that is utterly inconsistent with the common law of real property. Furthermore, the right given the plaintiff is to have the fertilizing water flow across his land. If the court is consistent and gives this right to all within the reach of the floods, none of the water can be taken out. The inevitable result is that the windfall will be wasted in the sea. The case, therefore, falls short of a satisfactory solution of the problem.

COMPETITION AS A JUSTIFICATION OF THE SECONDARY BOYCOTT. — A. refuses to do business with B. unless B. stops dealing with C. B. complies with A.'s demand. May C. sue A.? A.'s act is admittedly tortious unless justifiable under certain limited rights.[1] One of these is his right to compete with others for trade or employment.[2] But under what circumstances does this right justify him here?

Where A. is an individual we have no authority on this question. Nevertheless, a partial answer may be ventured. The right to inflict intentional harm on another can be recognized, only because of some preponderating public benefit anticipated from its exercise, — hence its extent must be determined by what is necessary to secure this benefit. Now the objects of the right to compete are to compel every citizen to give the community his best service, to have work done by the most competent, and to secure equality of opportunity to all. None of these objects can well be attained unless the citizen is free to concentrate his efforts along lines chosen by himself, — whence it results that the right to compete includes the right to refuse to take part in any enterprise

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if it were in a different watercourse. A difficult question of fact is raised, and this has constrained many authorities to treat flood water in the watercourse in the same way as the regular stream. See WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., p. 377.

[12] Authorities are collected in 25 L. R. A. 531; WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., p. 375.

[1] Walker *v.* Cronin, 107 Mass. 555; Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111. *Cf.* Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946. See POLLOCK, TORTS, 9 ed., p. 21.

[2] See the language of Bowen, L. J., in Mogul S. S. Co. *v.* McGregor, L. R. 23 Q. B. D. 598, 613.

unless given a share large enough to suit him.[3] This proposition, applied to four typical cases, seems to yield results consistent with everyday practice. (1) B. wishes A., a lumber dealer and contractor, to do the entire building of a house, save for the interior woodwork, which he means to instal himself. A. refuses unless B. will buy the wood for the interior finish from him. Clearly neither B. nor any competing lumber dealer could sue. (2) Same facts, except that B. intends to employ C. to furnish and instal the interior finish. A. refuses to build unless C. will buy his lumber. C. sues. It is submitted that he can no more succeed than could B. in the case above. A.'s right to dictate his own share cannot reasonably depend on such accidents as the number of would-be participants in the enterprise. (3) Here A. refuses to build if C. is employed, unless C. uses A.'s lumber on other contracts for interior finish, or (4) unless C. joins a builder's association. In these cases C.'s discharge is desired, not in order that A.'s labor or materials may replace his, but simply to make C., or those who deal with him, less able or less willing to compete with A. in other fields.[3] The chances that a monopoly so created will be economically efficient are too remote to justify the injury to C., hence the justification fails.[4] In short, then, A. may boycott the labor or products of others only for the purpose of replacing the specific unit of labor or product boycotted with his own.

Such, it is believed, is the law where A. is an individual, or a coöperative organization forming a single business unit.[5] Are the rights of a mere association of mutually independent individuals the same?[6] Here authorities are copious, but conflicting. Certainly the combination is liable in cases like the third[7] and fourth[8] above, but as to the first[9]

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[3] See discussion in Pickett *v.* Walsh, 192 Mass. 572, 583, 78 N. E. 753, 758.

[4] That is, the justification of competition. If a strike to force men into a union is lawful, as was argued by Holmes, J., in Plant *v.* Woods, 176 Mass. 492, 505, 57 N. E. 1011, 1016, it must be because monopoly and high prices are preferable to competition in the field of labor. An effort "to get more than one is now getting" is not of course synonymous with competition.

[5] As an ordinary partnership or corporation. Such a "combination" can perform services which its members acting separately could not. Hence it is to be likened to an individual, rather than to those mere aggregations of men which accomplish nothing new except to suppress internal competition. The distinction between these two sorts of combinations is probably the principal ingredient in the famous "rule of reason." See United States *v.* Du Pont de Nemours, 188 Fed. 127, 150; United States *v.* Standard Oil Co., 221 U. S. 1, 75, 31 Sup. Ct. 502, 520.

[6] For *dicta* that they are the same, see Mogul S. S. Co. *v.* McGregor, L. R. 23 Q. B. D. 598, 613; Delz *v.* Winfree, 80 Tex. 400, 404, 16 S. W. 111; POLLOCK, TORTS, 9 ed., pp. 333, 341. *Contra*, Pickett *v.* Walsh, 192 Mass. 572, 582, 78 N. E. 755, 757. SALMOND, TORTS, 2 ed., p. 466.

[7] Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Casey *v.* Cincinnati Typographical Union, 45 Fed. 135; Pickett *v.* Walsh, *supra*. *Contra*, Pierce *v.* Stablemen's Union, 156 Cal. 70, 103 Pac. 324. But it is not believed that the combination is here an essential element in the tort. See Giblan *v.* National Amalgamated Union, [1903] 2 K. B. 600, 619.

[8] Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607; Martell *v.* White, 185 Mass. 255, 69 N. E. 1085; Plant *v.* Woods, 176 Mass. 492, 56 N. E. 1011; Purvis *v.* United Brotherhood, 214 Pa. 348, 63 Atl. 585; March *v.* Bricklayers' Union, 79 Conn. 7, 63 Atl. 291. *Contra*, Macauley *v.* Tierney, 19 R. I. 255, 33 Atl. 1. Here again the element of combination is not deemed essential.

[9] The following cases hold that the combination is liable. Lucke *v.* Clothing Cutters' Assembly, 77 Md. 396, 26 Atl. 505; Jackson *v.* Stanfield, 137 Ind. 592, 36 N. E. 345.

and second [10] the decisions are sharply split. The following conclusions, however, are suggested as sound, and tenable on the authorities. First, the first and second cases above cannot fairly be distinguished, for the reasons already given. Secondly, the combination is usually liable in both. A. is not a unit for any purpose of serving the community, hence it cannot claim the right to compete as a unit.[11] The fact is that X. and Y. are demanding C.'s business for Z. Whatever the merits of this transaction, they are not those of competition.[12]

In a recent case a carpenter's union consistently refused to handle any lumber manufactured in an "open shop." Plaintiff, an "open shop" manufacturer, sought to enjoin this boycott so far as it affected his product. Relief was denied. *Paine Lumber Co., Ltd.*, v. *Neal*, 50 N. Y. L. J. 1497 (U. S. D. C., So. Dist. of N. Y., November, 1913). The decision, though inconsistent with the views here expressed, is in accord with prior New York cases, since the facts are those of the second supposed case, in which A., even though a combination, is held justified in New York.[13] But the court's reason, namely, that a boycott directed indiscriminately against all persons of a class is a public wrong, to be enjoined only at the suit of the state, is unsound. Public property rights, like the right to travel on the roads, cannot, indeed, be vindicated by private persons; but where the right infringed is vested in the plaintiff individually, he may sue to protect it, no matter how many other citizens may be deprived of the same right by the defendant's act.[14] The right to engage in business is of the latter class.[15] There seems to be no warrant for putting this new obstacle in the path of those seeking to escape the oppression of "organized" labor or capital.

Contra, National Protective Association *v.* Cumming, 170 N. Y. 315, 63 N. E. 369; Pickett *v.* Walsh, *supra*; Scottish Co-operative Society, Ltd., *v.* Glasgow Fleshers' Association, 35 Scot. L. Rep. 645. *Cf.* Mogul S. S. Co. *v.* McGregor, [1892] A. C. 25.

[10] The following cases hold that the combination is liable. Quinn *v.* Leathem, [1901] A. C. 495; Lyons *v.* Wilkins, [1896] 1 Ch. 811. *Contra*, Pickett *v.* Walsh, *supra*; National Fireproofing Co. *v.* Mason Builders' Association, 169 Fed. 259.

[11] This fact alone suffices to answer the argument that because some individuals are more powerful than some combinations, therefore individuals and combinations should be treated alike. That argument is still further weakened by the fact that an individual can seldom make his services indispensable without subjecting himself to the public service law. Inter-Ocean Publishing Co. *v.* Associated Press, 184 Ill. 438, 56 N. E. 822.

[12] Here again it is necessary to notice a modern tendency to hold that the social interest justifies restraints on competition among laborers for certain purposes. National Protective Association *v.* Cumming, 170 N. Y. 315, 323, 63 N. E. 369, 370; National Fireproofing Co. *v.* Mason Builders' Association, 169 Fed. 259, 268. Properly understood, these decisions restrict, rather than extend, the right of competition.

[13] National Protective Association *v.* Cumming, *supra*; National Fireproofing Co. *v.* Mason Builders' Association, *supra*.

[14] Wesson *v.* Washburn Iron Co., 95 Mass. 95; King *v.* Morris & Essex R. R. Co., 18 N. J. Eq. 397.

[15] This is shown by the fact that it is "property" protected by the Constitution. Allgeyer *v.* Louisiana, 165 U. S. 578, 17 Sup. Ct. 427. The right to use the roads is not so protected. Stanwood *v.* Malden, 157 Mass. 17, 31 N. E. 702; Kings Co. Fire Ins. Co. *v.* Stevens, 101 N. Y. 411, 5 N. E. 353. See 2 ELLIOTT, ROADS AND STREETS, §§ 1172, 1180, 1181.